



S. 2488 – Open Government Act of 2007

FLOOR SITUATION

S. 2488 is being considered on the floor under suspension of the rules and will require a two-thirds majority vote for passage. This legislation was introduced by Senator Patrick Leahy on December 14, 2007. The bill passed the Senate on December 14, 2007, by unanimous consent.

S. 2488 is expected to be considered on the floor on December 18, 2007.

**Note: The House passed similar legislation (H.R. 1309) on March 14, 2007 by a vote of 308 to 117 (Roll Call Vote 144).*

BACKGROUND

The Freedom of Information Act (FOIA) was signed into law by President Lyndon B. Johnson, in 1966. FOIA allows any person, individual or corporation (regardless of citizenship), to request certain records held by the Executive branch, including agencies. Requests can be made without explanation or justification, and can regard any topic. The design of FOIA was to open the government to the press and the public to provide access to records that were previously unavailable.

However, there are 9 specific exemptions and 3 exclusions contained in the statute which allow the Executive branch to withhold requested information. These exemptions pertain to sensitive materials, trade secrets, and other national security matters.

Pursuant to FOIA, agencies may charge a fee for certain actions relating to a FOIA request. In the event that a request is granted, depending on the size and scope of the request, an agency may provide the requestor with a few sheets of paper or a file that contains hundreds of thousands of sheets of paper. Following up on a request causes the agency to do a records search, duplicate the information requested, expend staff time, and review the information; this is a costly endeavor. Conversely, an agency can provide a requester with the necessary information at a reduced cost, or no cost at all, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

FOIA has been amended four times since 1966. In the 109th Congress, Lamar Smith (R-TX) introduced the OPEN Government Act of 2005 (H.R. 867). H.R. 867 was very

similar to H.R. 1309 and called for many of the same amendments to FOIA. The bill was referred to the Committee on Government Reform and the Subcommittee on Government Management, Finance, and Accountability held a mark-up on September 27, 2006. The bill was forwarded to the full committee by voice vote but no further action was taken.

The Freedom of Information Act does not apply to Congress. Article I, Section 5 requires the Congress to keep a journal of its actions, except those parts that are required to be kept secret. This has been interpreted to allow Congress to keep certain records secret and inaccessible to the public. Also, Article I, Section 6, the “Speech or Debate clause,” is interpreted to concern floor, committee, subcommittee, or legislative activity related to the activities of a congressional office.

SUMMARY

Protection of Fee Status for News Media

The bill defines “news media” as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”

**Note: Under current law, “fees shall be limited to reasonable standard charges,” for news media.*

Recovery of Attorney Fees and Litigation Costs

This section expands the ability to recover attorney’s fees. Specifically, it stipulates that if a complainant has “substantially prevailed,” the complainant is eligible to receive attorney’s fees from the United States. The bill defines “substantially prevailed” as receiving relief through a judicial order, administrative action, or an enforceable written agreement or consent decree, or a voluntary or unilateral change in position by the opposing party, in a case in which the complainant’s claim or defense was not frivolous.

The bill states the attorney’s fees must be awarded from a fund created by the House Committee on Appropriations and no funds may come out of the Claims and Judgment Fund of the United States Treasury.

**Note: Current law enables a court to impose attorney’s fees and litigation costs against the United States when a complainant has “prevailed.”*

Disciplinary Actions for Arbitrary and Capricious Rejections of Requests

The bill requires the Attorney General to notify the Special Counsel of each civil action taken against the United States for wrongfully withholding requested material under FOIA.

Time Limits for Agencies to Act on Requests

Agencies cannot charge search fees for requested documents if they do not comply with the 20 day deadline to determine whether to comply with a request for information.

Individualized Tracking Numbers for Requests and Status Information

The bill calls for agencies to create a tracking number for each request that will take longer than 10 days to process. Additionally, the bill would establish a telephone line or Internet service that provides status information about the request.

Reporting Requirements

S. 2488 calls for additional reporting on FIOA activities. These reporting requirements include (but are not limited to):

- The average number of days agencies took to respond to request;
- The median number of days for the agency to respond requests;
- The range in number of days for the agency to respond to such request;
- The number of requests agencies have responded to with a determination within 20 days and in 20-day increments up to 200 days;
- The number of requests agencies have responded with a determination within a period greater than 200 days and less than 301; and
- The number of requests to which the agency has responded with a determination within a period greater than 400.

Openness of Agency Records Maintained by a Private Entity

The bill clarifies that government records include any information that would be an agency record, including information in electronic format. The bill also clarifies that records possessed by non-government third parties are subject to FOIA policies.

Office of Government Information Services

The bill creates an Office of Government Information Services as part of the National Archives and Records Administration. The objective of the office of Government Information Services is to review policies and procedures, review compliance by administrative agencies, and recommend any policy changes to Congress and the President. Additionally, the Office is required to provide mediation services to resolve disputes.

Furthermore, the bill requires each agency to designate a Chief FOIA Officer.

Reports

The bill requires reports to Congress on personnel policies related to FOIA.

COST

The Congressional Budget Office has not yet scored this legislation.